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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re E.G., a Person Coming Under the Juvenile Court Law.	B215069 (Los Angeles County Super. Ct. No. CCK71428)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.G. et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County. Stanley Genser, Juvenile Court Referee, Judge. Affirmed.

Melissa A. Chaitin, under appointment by the Court of Appeal, for Defendant and Appellant S.G.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant G.L.

Office of County Counsel, James M. Owens, Assistant County Counsel, Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Appellants S.G. (mother) and G.L. (father) appeal the order terminating parental rights to their approximately two-year-old son E.G. (the child). (Welf. & Inst. Code, § 366.26, subd. (c).)[1] Father contends that the juvenile court erred in terminating his parental rights because he had not been proven an unfit parent, and that the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; hereinafter, ICWA). Mother contends that if father's parental rights are not terminated, neither should her parental rights be terminated. We find that the juvenile court did not err in terminating father's parental rights, and there was no ICWA notice error. Mother's contention is thus unavailing.

FACTUAL AND PROCEDURAL SUMMARY

In January of 2008, respondent Department of Children and Family Services (DCFS) filed a dependency petition (§ 300) on behalf of the then-10-day-old child, alleging parental unfitness based on mother's homelessness, her refusal to accept community services and shelter, and her intention to reside with the newborn in the streets. DCFS was also concerned about mother's mental health and the fact that she had been unaware of her pregnancy until she was ready to give birth. The child's father had not yet been identified. The juvenile court detained the child in DCFS custody.

In February of 2008, at a jurisdiction and disposition hearing, DCFS reported that mother had other children in Mexico. Her former husband living in Mexico had obtained a restraining order against her and had gained custody of the children because she physically abused them. Mother was homeless, had no family or friends to support her, and had been living in the United States for seven years. Mother initially told DCFS social workers that she did not know the identity of the child's father. Later, mother told the social workers who she thought was the father, and he confirmed to them that he was the father.

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[1] All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

Mother had been homeless for the past two years, and the social worker at the hospital where the child was born gave mother referrals for mental health resources. Father confirmed that he had a sexual relationship with mother, but was unsure whether he was the child's father. He met mother on the streets. Father had known her for more than a year, but she often confused him with her ex-husband and yelled at him as if she was reliving a trauma. Father appeared genuinely concerned about both mother and the child. The juvenile court found him to be the child's presumed father, ordered monitored visits for both parents, and continued the matter to March of 2008.

Meanwhile, DCFS determined that father was still homeless and had no stable employment or income. He was homeless, living in missions, in a tent, or in a sleeping bag. Because of his work as a day laborer, he was unable to stand in line for hours in hopes of obtaining a bed at a shelter. Father also had difficulty finding work because he was undocumented and did not speak English well. Father did not believe mother was capable of caring for the child, but he had no plan if the child were placed in his care. Father stated that he had to go everywhere with mother because she could not function alone, and he acknowledged that she held him back. Father asserted that he would try to find contact information for some of his relatives who lived in other cities and could possibly be placement options for the child. However, he never followed through with any contact information.

A month later at a continued hearing, the social worker advised the court that she had completed a referral for a shelter on the parents' behalf, but that the parents failed to provide any new information regarding their housing situation. The social worker also provided them with various referrals for individual counseling and parenting classes, but she was then unable to contact them.

At a continued hearing in May of 2008, DCFS reported that the parents were still homeless and living a transient lifestyle. They could no longer be reached by telephone. There was concern over mother's mental health, and she had an appointment for a mental health evaluation. The court sustained the section 300 petition and questioned why father was not specifically referenced in the petition, noting that he seemed "substantially

involve[d]" in the same conduct as alleged regarding mother. Father submitted to the court's jurisdiction, and the court advised him it was taking jurisdiction over the child because of his inability to provide housing for the child and to meet the child's needs. The court warned father that he would receive six months of reunification services. If he was unable to reunify by the end of that time, the court could seek to terminate parental rights. The court then clarified that DCFS would have to establish a basis for keeping the child out of father's custody because he was a nonoffending parent in the dependency petition. Father indicated that he understood the consequences and was willing to submit to the court's jurisdiction, and the submission to jurisdiction was agreed to by father's attorney.

The court declared the child a dependent, finding by clear and convincing evidence that there was a substantial risk of detriment to the child because both mother and father were homeless and had no means of supporting the child or appropriately taking care of him and providing housing. The court thus removed the child from the parents' custody and ordered reunification services for both parents. The court also ordered monitored visits for mother and unmonitored visits for father.

In October of 2008, at the six-month review hearing, DCFS reported that the child was placed in a foster home with the prospect of adoption and had adjusted well. Both parents remained unstable in terms of housing and employment. When visiting, mother was unkempt, though father was well groomed. Mother indicated she preferred living in the street than living in a shelter. Father generally stayed with her and asserted that the shelters were worse than the streets. Father continued to be supportive of mother, sometimes giving her money he collected from recycling cans. Father appeared emotionally dependent upon her because he followed her and lived according to her standards.

Father was concerned about mother's mental health. She acted paranoid and confused him with her ex-husband, accusing father of kicking her out of the house and of taking away her business, money, and children. Father would not take the child out during visits because he was afraid of how mother would react. Mother attended five of

24 parenting classes at one program, and three sessions at another program. Father attended three parenting sessions at one program, and eight sessions at another program. Mother indicated she needed a more intensive program to give her step-by-step instruction on how to raise her child. Mother failed to participate in any individual therapy, despite receiving several referrals. She also missed her appointment for a psychological evaluation.

Meanwhile, the child was by then eight months old and was developing well, though after parental visits he became more emotional. The child then cried easily and had difficulty falling asleep. Mother visited regularly. However, she attempted to give the baby coffee, gum, and pork rinds. Mother pulled on his hair and complained when he cried. She also threatened to take the baby.

Although father had permission to monitor mother's visits, the social worker was uncomfortable with the arrangement because mother ignored father's suggestions and "slapped his hand while telling him to leave her alone." Father never requested to take the child out of the DCFS office, even though he was entitled to do so, because he was afraid of how mother would react. However, father visited regularly and once took the child out to visit family that was visiting from Mexico.

The court ordered the parents not to visit together and prohibited father from acting as mother's visitation monitor. The court continued the matter for a contested hearing because DCFS recommended terminating reunification services. At the contested hearing, DCFS reported it made a referral to the social services agency in Mexico to possibly place the child with his paternal grandmother, who resided there. Also, father had rented a room from a woman with two children, but remained ambivalent about employment. He re-entered a parenting program and attended two classes, but failed to show up for one class. The parents continued to visit with the child regularly.

The court declined to extend reunification services another six months and admonished father that, "You can't benefit from parenting class if you take a few classes here and a few classes there and—there's no way—there's no evidence to suggest that

he's going to solve his housing problems in the next six months. He seems to be more concerned with mother and her welfare than the welfare of the child and seems to place mother as a priority over his child. He's not made any progress whatsoever." Thus, the court terminated reunification services and referred the matter to a section 366.26 hearing to select and implement a permanent, out-of-home plan for the child.

In March of 2009, at the section 366.26 hearing neither parent appeared. Mother continued to visit regularly, but her inappropriateness during the visits escalated and distressed the child. Mother laughed and talked to herself during the visits. Regarding father's visits, in January and February of 2009, he missed three consecutive visits and failed to call to cancel. During more recent visits, father arrived late. The child did not react well after parental visits, and his distress lasted a day or two. The child would pull his hair, slap his forehead, and wake up screaming. Such behavior was in contrast to visits by the foster parents, after which the child reacted well.

The child was in the prospective adoptive home of a married couple with no children. The child had lived with them for over seven months and was thriving in their care. The court continued the matter for a contested hearing on whether to terminate parental rights to free the child for adoption.

At the continued hearing in April of 2009, both parents were present. DCFS reported that the parents continued to be unstable. The social worker was unable to verify father's residence, and he was not forthcoming about such information. Since the termination of reunification services in November of 2008, neither parent had attempted to contact the social worker, except to pick up a bus pass or when the social worker approached them during a visit. The social worker testified she was aware father was a nonoffending parent in the section 300 petition. In response to arguments by counsel as to whether poverty and homelessness were the only issues, the court indicated that father was unable to assume custody of the child for reasons other than his lack of housing. Father was ordered to complete a parenting program and to maintain consistent, ongoing visits, which he failed to do. Also, father appeared enmeshed with mother, who clearly

posed a risk to the child. That relationship, coupled with the continued homelessness, presented an ongoing risk of detriment to the child.

As the court observed, "Father has joined in mother's lifestyle. They sleep in the park together. They're transient together. He has not developed an independent life from mom. Whether he's an enabler or mother's caretaker or whatever, she basically runs his life, according to the reports I have. And for me to return the child to father, he doesn't have the capability, emotionally or otherwise, financially, emotionally, or whatever, to care for this young child." The court emphasized that father had the opportunity to take the child out for visits, but he refused because "he was afraid the mother would find out. . . . There's no evidence that he does have appropriate housing. And there's no evidence that he has developed a relationship with the child . . . . This father basically has had a few monitored visits here and there and that's it."

The court acknowledged that father was not mentioned in the section 300 petition and opined that perhaps the matter could have been handled differently. However, it stressed that ample evidence established it would be detrimental to place the child with father, which constituted a basis for terminating parental rights. Father's counsel acknowledged the procedural propriety of terminating parental rights with a finding of detriment to the child, even in the absence of allegations against father in the dependency petition.

The matter was trailed to the following day. Father failed to appear. The social worker continued her testimony, stating that in addition to the housing issue, she was concerned that father never completed his programs and missed visits. He attended some parenting classes, but never completed them. Initially, father regularly visited the child on a weekly, unmonitored basis. Thereafter, the visits became monitored because of mother's behavior during visits at times when both mother and father visited together, and then the court suspended visits. The social worker explained that mother posed a risk to the child and asserted that father could not protect the child from mother.

With the concurrence of the child's attorney, the court terminated parental rights. Both the child's attorney and county counsel argued that father was unfit beyond just

being homeless. As indicated by the social worker's log notes, all of her contacts with father revealed he was more concerned with mother and her needs than with what father had to do to regain custody of the child. The court cited to the October 20, 2008, DCFS report, which documented the parents' dynamic as evidence supporting father's unfitness. Specifically, if the court released the child to father, the child would be at substantial risk because father would not protect him from mother.

Following the termination of parental rights, both parents appealed.

DISCUSSION

I. The court's finding that father was an unfit parent was supported by substantial evidence, and the court was thus authorized to terminate parental rights.

Father contends the court should not have terminated his parental rights because (1) it purportedly never found him to be unfit, (2) poverty and homelessness were supposedly the only bases for denying father custody of the child, and (3) father's failure to complete programs did not indicate he posed a risk to the child. These claims are unfounded, and the court did not err in terminating parental rights.

First, the court did find father to be an unfit parent. Although the court did not sustain the section 300 petition allegations against father, it clearly made unfitness findings based on factors other than his lack of housing and his poverty. At the April 1 and 2, 2009, hearing at which it terminated parental rights, the court made appropriate findings. The court supported its determination of father's unfitness by finding that father was overly enmeshed with mother and more concerned about her welfare than readying himself to assume custody of the child, that father had failed to take advantage of the services provided by DCFS to create an appropriate home for the child, and that father had failed to visit the child as often as he could have and failed to establish a relationship with the child.

At the disposition hearing by clear and convincing evidence and also at a review hearing, the court made findings that returning the child to mother's or father's custody would create a substantial risk of detriment to the child. Indeed, when the court questioned the propriety of omitting father from the section 300 petition, it noted that the

allegation it found true against mother applied equally to father. Thus, the court did find father unfit.

We acknowledge, of course, that due process prohibits the termination of parental rights of a parent that DCFS never alleged, and the juvenile court never found, to be unfit. (*In re Gladys L.* (2006) 141 Cal.App.4th 845, 848.) And, an appellate court may not make its own finding of unfitness because it is not a court of first impression. (*Id.* at pp. 848-849.) However, where the juvenile court made findings that returning the child to father's custody would create a risk of detriment to the child, "the absence of a jurisdictional finding that related specifically to [father] does not prevent termination of parental rights." (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1212-1213.) A sustained dependency petition alleging unfitness of each parent is not a prerequisite to termination of parental rights. (*Ibid.*) "[F]indings of detriment, if supported by substantial clear and convincing evidence, may provide an adequate foundation for an order terminating parental rights even in the absence of a jurisdictional finding related specifically to a parent." (*In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1214.)

In the present case, father sought housing, but he could not financially maintain suitable housing even if he secured such housing. Significantly, however, father's unfitness was based on more than merely his lack of housing and his poverty. Rather, father failed to take full advantage of his visitation rights to establish a more meaningful parental relationship with the child. He had permission to take the child out of the DCFS office for visits, but he did not do so for fear of mother's reaction. Father's enmeshment with mother revealed an unwillingness or inability to protect the child from mother and her lifestyle. Father failed to sufficiently avail himself of the services provided by DCFS which could have helped him establish a proper home for the child. He attended sessions at several parenting courses, for example, but he did not complete a parenting program.

Father asserts a "tremendous irony" because DCFS paid for the child's foster care placement and that money could have been given to father for housing. However, DCFS did provide father with referrals for housing and other resources, but father did not avail himself of such resources. Father never claimed below, nor does he claim now on appeal,

that DCFS failed to provide him with reasonable reunification services. Indeed, "'[r]eunification services are voluntary . . . and an unwilling or indifferent parent cannot be forced to comply with them.'" (*In re Ronell A.* (1995) 44 Cal.App.4th 1352, 1365.)

Also unavailing is father's argument that more of an effort should have been made to inquire about placement with paternal relatives in Mexico. The record indicates that placement with Mexican relatives was contemplated at one point. However, father never raised the possibility of placement with his relatives, and unless a new placement is sought, the preference for relative placement only applies before family reunification services are terminated. (See *In re Joseph T.* (2008) 163 Cal.App.4th 787, 796-797.)

Nor, contrary to father's assertion, were the prospective adoptive parents "skittish" to adopt. As indicated in the section 366.26 report, "the prospective adoptive parents are extremely eager to finalize the adoption." The adoptive home study was approved, and the social worker found that the prospective adoptive couple had "demonstrated that they care, love and are willing to provide stable and long term care for the child through adoption."

Accordingly, the court did not err in terminating father's parental rights as to the child.

II. The juvenile court adequately complied with ICWA.

Father contends that because he stated he believed that the child might have American Indian ancestry through the paternal grandfather who was deceased, the juvenile court erred in not pursuing further inquiry into the matter. However, under the factual circumstances here, father actually did not give the court reason to know the child is Indian and thus no ICWA notice was required.

Pursuant to ICWA, when there is reason to know a child is Indian, notice requirements are triggered and mandate that DCFS provide notice of the court proceedings to the relevant tribe or the Secretary of the Interior (25 U.S.C. § 1912(a)), who has designated the Bureau of Indian Affairs as its agent to receive such notices (25 C.F.R. § 23.11(b), (c)(12) (2009)). California has adopted identical language regarding ICWA notice requirements. Formal notice is required when it is known or

there is reason to know that an Indian child is involved. (§ 224.2, subd. (a); see also Cal. Rules of Court, rule 5.481(b)(1).) However, if the agency "knows or has reason to know that an Indian child is or may be involved," the agency is not required to send formal notice, but rather is required only to "make further inquiry" about the child's Indian status. (Cal. Rules of Court, rule 5.481(a)(4).)

In the present case, soon after the child's initial detention, mother told the DCFS social worker that she did not have any Native American heritage. Father also stated that he had no Native American heritage. Both parents are from Mexico.

At the February 2008 jurisdiction and disposition hearing, mother reiterated she had no Native American ancestry. However, father indicated he "may have" American Indian ancestry through his paternal grandfather who was deceased. Father did not know what tribe. The court inquired, "Is there anybody else that might know or might have information about your American Indian ancestry?" Father replied, "Not that I know of," and the court concluded, "Then, the court today has no reason to know the child is a member of or eligible for membership in any American Indian tribe."

Accordingly, father's vague assertion that he *believed* he *may* have Indian ancestry—with no idea as to what tribe and with no family member who could provide relevant information—was simply insufficient to trigger the ICWA notice requirement. Father's vague and uncertain assertion was also inconsistent with his initial denial of Indian ancestry. The court simply did not have actual reason to *know* that the child was an Indian. (Cal. Rules of Court, rule 5.481(a)(4).) Thus, there was no ICWA error.

III. Mother's claim on appeal.

Mother's sole contention on appeal is that if we reverse the order terminating father's parental rights, we must reverse as to her as well, even absent any independent error pertaining to her, because reinstatement of one parent's rights precludes the child's adoption. (See *In re Mary G.* (2007) 151 Cal.App.4th 184, 208; *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 110.) However, because we affirm the order terminating parental rights as to father, mother's contention is unavailing.

DISPOSITION

The order under review is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.